

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

BEFORE THE HONORABLE WILLIAM H. ALSUP

RICHARD DENT, et al, )  
 )  
 )  
 Plaintiffs, )  
 )  
 vs. ) No. C 14-2324 WHA  
 )  
 NATIONAL FOOTBALL LEAGUE )  
 ) San Francisco, California  
 Defendant. ) Thursday  
 ) March 21, 2019  
 ) 8:00 a.m.

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**TRANSCRIPT OF PROCEEDINGS**

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**(APPEARANCES CONTINUED ON FOLLOWING PAGE)**

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*Official Reporter - US District Court*

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Thursday - March 21, 2019

8:58 a.m.

P R O C E E D I N G S

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**THE COURT:** Now we go to NFL.

**THE CLERK:** Calling Civil Action 14-2324, Richard Dent, et al versus National Football League.

Counsel, please step forward and state your appearances for the record.

**THE COURT:** Welcome back. Appearances, please.

**MR. CLOSIUS:** Thank you, Your Honor. Your Honor, Phil Closius for the plaintiff, Richard Dent.

**MR. DEARMAN:** And Mark Dearman for the plaintiff.

**THE COURT:** Okay. Welcome back.

**MR. NASH:** Good morning, Your Honor. Daniel Nash for the defendant National Football League.

**MR. DiCANIO:** Good morning, Your Honor. Jack DiCanio also for the defendant.

**THE COURT:** Welcome back. So we're here after a remand by the Court of Appeals and now yet another Motion to Dismiss based upon a new pleading.

So let's hear first from the moving party. Please, you go first.

**MR. NASH:** Thank you, Your Honor.

Let me focus on what we believe is the case dispositive issue on the Motion to Dismiss, and that is that the third

1 Amended Complaint, plaintiffs' best and final complaint in this  
2 case, does not satisfy the standards for pleading a negligence  
3 claim against the NFL that were established in the Ninth  
4 Circuit's opinion.

5 The Ninth Circuit ruled unequivocally that plaintiffs'  
6 negligence claim against the NFL could proceed only to the  
7 extent -- and those were words from the opinion -- that the NFL  
8 supplied the plaintiffs with medications in a manner that  
9 violated the law and caused their injuries.

10 **THE COURT:** Help me. I got their opinion here  
11 somewhere.

12 All right. Actually, I guess I don't. I thought I had  
13 the opinion.

14 Do I have the opinion here? Would you find it for me?  
15 Just a minute. I want to take the time to have it.

16 (Brief pause.)

17 **THE COURT:** All right. Now I do have it here. Yes.  
18 Okay. Show me in the opinion where you're quoting from.

19 **MR. NASH:** There would be several places. And I  
20 should start, Your Honor, by --

21 **THE COURT:** Please. Come on. You can see I want a  
22 straight answer. Show me where you were quoting from. I  
23 believe it's probably in there somewhere, but then I ask you  
24 the question and then you slide off to something else.

25 Come on. Help me. You can slide off to it after you

1 answer my question. Show me where you were quoting from.

2 **MR. NASH:** On Page 20 of the slip opinion, Your  
3 Honor.

4 **THE COURT:** All right. I see right off the bat we're  
5 goofed up. I have the Fed 3rd opinion.

6 Here. I'm going to hand it down to you and you highlight  
7 the language that you want me to look at.

8 **MR. NASH:** Sure. It would start on --

9 **THE COURT:** Give counsel a pen so he can mark it.

10 **MR. NASH:** Sure. Okay. On Page 1121.

11 **THE COURT:** All right.

12 **MR. NASH:** (As read)

13 "We express no opinion regarding the merits of  
14 plaintiffs' negligence claim, which will require the  
15 plaintiffs to establish that the relevant statutes  
16 apply to the NFL, the NFL violated those statutes, and  
17 that the alleged violations caused the players'  
18 injuries."

19 The Court goes on on that same page to note that:

20 "At many points in the Second Amended Complaint  
21 the plaintiffs appear to conflate the NFL and the  
22 teams, but the plaintiffs are pursuing a theory of  
23 direct liability, not vicarious liability, and they  
24 have attempted to vindicate virtually identical claims  
25 against the clubs themselves in separate litigation we

1 have in this case. Therefore, on remand any further  
2 proceedings in this case should be limited to claims  
3 arising from the conduct of the NFL and NFL personnel,  
4 not the conduct of individual team employees."

5 **THE COURT:** Mark that last sentence that you just --  
6 mark it for me so that I can have that.

7 **MR. NASH:** And then it goes on to say that it leaves  
8 it to the District Court to determine whether plaintiffs have  
9 met that standard.

10 **THE COURT:** Okay. Now, I want to stick with that  
11 point because that -- and come back to plaintiff for a minute.

12 This is going to take me a few minutes to develop this --  
13 develop this, and I might even take a break and give you a  
14 chance to organize your thoughts on this. But along the lines  
15 of what counsel just said, the Court of Appeals opinion -- but  
16 now I can't find it again. Just a minute.

17 **MR. NASH:** Page 1120.

18 **THE COURT:** No, no, no. What you -- there was  
19 another place where they had a bunch of bullet points, and I  
20 had opened to that very page, and it's now gone.

21 Can my Law Clerk come up here and find that again?

22 **MR. CLOSIUS:** Your Honor, I believe it's Page 1115.

23 **THE COURT:** Yes, that's it. All right. Thank you.

24 At Page 1115 the Court of Appeals says:

25 "But the players' Second Amended Complaint

1 asserts that the NFL itself directly provided medical  
2 care and supplied drugs to players. For example, the  
3 SAC" -- meaning Second Amended Complaint -- "alleges  
4 that..."

5 And then there is one, two, three, four, five, six, seven  
6 quotations from the Second Amended Complaint, all bullet points  
7 and indented to sustain the point made by the Court of Appeals.  
8 And, again, the point made by the Court of Appeals was that the  
9 Second Amended Complaint asserted that the NFL itself directly  
10 provided medical care and supplied drugs to players.

11 Now, in reviewing the new complaint -- by the way, that is  
12 what got me reversed, was that part, where you convinced the  
13 Court of Appeals that you were alleging that the NFL itself  
14 directly provided medical care and supplied drugs to players.

15 I've got to repeat it because it's so important. The NFL  
16 itself directly provided medical care and supplied drugs to  
17 players. And then there are the seven or eight bullet points.

18 Now, as a footnote, I need to say that that was not the  
19 way I understood the original pleading. The original pleading  
20 was directed at the -- the National Football League was  
21 negligent in the way in which it had supervised the way in  
22 which the clubs had provided medicine to the players, and that  
23 was the thing that was preempted.

24 Well, you were able to put a different spin on it in the  
25 Court of Appeals and convince the Court of Appeals that, no, I

1 was wrong and I had misread the Complaint and that the  
2 Complaint itself asserted that the NFL itself directly provided  
3 medical care and supplied drugs to players.

4 All right. Now, of the examples that are in this opinion  
5 that was used by the Court of Appeals to reverse me, not a  
6 single one of them are in the new pleading, the one on remand,  
7 except arguably one. But I want to just say, we've checked.  
8 Not a single one of them survived. For some reason you didn't  
9 stick with that once you got back down.

10 And now I want to explain -- I need my Law Clerk to come  
11 help me find the new -- the Third Amended Complaint. Where did  
12 that go? I need that paragraph they were discussing. I had  
13 this all organized.

14 (Brief pause.)

15 **THE COURT:** Thank you.

16 Okay. The one that is arguably still in the pleading, but  
17 I'm going to come to that in some detail, was the next to the  
18 last one in which the Second Amended Complaint, and the Court  
19 of Appeals quotes from it, quote:

20 "Medications are controlled by the NFL Security  
21 Office in New York."

22 I'll repeat that, quote:

23 "Medications are controlled by the NFL Security  
24 Office in New York."

25 Leaving the impression that there is a room somewhere at



1 the NFL Security Office in New York full of medicine.

2 Well, all right. Here is what the Second Amended  
3 Complaint said on that point. I went back to look.  
4 Paragraph 210 -- actually, you need to look at 209 for a  
5 moment. That's a paragraph about Van Horne and some drugs that  
6 were being -- that were being prescribed on a mass basis for  
7 him.

8 209 said:

9 "There are already DEA records that hundreds of  
10 pain killers had been ordered in Van Horne's name even  
11 though Van Horne had no need for the medications the  
12 Bears had ordered at the time the order was placed."

13 So this was about the Bears getting the Club -- the Bears  
14 getting mass pain killers for Van Horne. That's 209.

15 Then we come to 210, and I'll read it exactly:

16 "Upon information and belief, the practice of  
17 mass ordering in a player's name no longer occurs.  
18 Instead, medications are controlled by the NFL  
19 Security Office in New York, which has implemented  
20 tighter controls in the last decade according to one  
21 former trainer, who for years was a member of the  
22 NFL's Committee on Performance Enhancing and  
23 Prescription Medications. In addition, according to a  
24 2013 *Washington Post* article titled, quote, Pain and  
25 Pain Management in NFL Spawn a Culture of Prescription

1 Drug Use and Abuse, close quote, the NFL contracted  
2 with an independent vendor SportPharm" -- that's all  
3 one word, sport and then with a capital P-h-a-r-m --  
4 "to track and log the extensive amounts of medication  
5 dispensed to teams."

6 Now, that's what 210 said, and that's what was before the  
7 Court of Appeals that reversed me, and that's what led to the  
8 bullet point in the reversal opinion saying, quote:

9 "Medications are controlled by the NFL Security  
10 Office in New York."

11 Which left with the Court of Appeals the very clear-cut  
12 impression that there was a place in New York called the NFL  
13 Security Office from which the NFL itself was dispensing  
14 medications to teams.

15 All right. Now, we come to how much of that is actually  
16 still being alleged? Well, it doesn't go nearly that far any  
17 more.

18 It now says in Paragraph 180 of the now operative  
19 Complaint, Paragraph 180 -- this is as close -- as close as I  
20 think the pleading now comes to any of these bullet points, and  
21 it doesn't, in my view, come very close at this point. I'm  
22 reading verbatim, Paragraph 180:

23 "The NFL also exerts control over and constant  
24 monitoring of the storage and administration of  
25 controlled substances and prescription drugs through

1       their agent, the NFL Security Office. NFL Security  
2       Office personnel regularly meet and consult with Club  
3       officials, including doctors and trainers, and conduct  
4       regular audits of Club recordkeeping and facilities."  
5       That's it.

6       So no longer is there an impression that there is this  
7       room in New York where the NFL dispenses drugs to the clubs.  
8       It's now monitoring and, quote, control over, whatever that  
9       means, and the personnel regularly meet and consult.

10       So I raise the question whether or not the very bullet  
11       points on which the Court of Appeals was led to reverse me have  
12       been completely abandoned by the plaintiffs and no longer --  
13       you led the Court of Appeals to believe that the NFL was  
14       dispensing drugs. I have a feeling that's utterly false, but I  
15       don't know that.

16       But that's where I'm going to start, with the NFL. Is  
17       there such a place as the NFL Security Office and do they store  
18       drugs there?

19               **MR. NASH:** Absolutely not, Your Honor.

20               **THE COURT:** Has there been discovery in the other  
21       case to prove that?

22               **MR. NASH:** There has been substantial discovery in  
23       the other case of both the NFL and of the clubs. I don't  
24       believe there has ever been anything that could remotely come  
25       close to that.

1           **THE COURT:** Well, but has there been discovery into  
2 the NFL Security Office?

3           **MR. NASH:** Umm --

4           **THE COURT:** I would be willing to give plaintiff the  
5 opportunity in this case, if there hasn't been, to go to New  
6 York. I want to take that issue -- I am just -- I would be  
7 shocked if the NFL Security Office dispensed drugs, but I --  
8 see, I got reversed before on something. I wouldn't want you  
9 to go up and say I didn't give you a chance to take, so I will  
10 give you that chance to go take that discovery --

11           **MR. CLOSIUS:** Not needed, Your Honor.

12           **THE COURT:** What?

13           **MR. CLOSIUS:** Not needed.

14           **THE COURT:** Well, what do you mean it's not needed?  
15 Do you concede?

16           **MR. CLOSIUS:** First of all, I assume Counsel Nash  
17 agrees there is an NFL Security Office. He's referring to  
18 there is no drugs stored there when he answered no.

19           **THE COURT:** Well, are there any drugs ever dispensed  
20 out of there?

21           **MR. CLOSIUS:** No, not that we know of.

22           **THE COURT:** All right. Well, do you want discovery  
23 to go find out?

24           **MR. CLOSIUS:** Whether there are physical drugs in the  
25 NFL Security Office?

1           **THE COURT:** That's the impression you gave the Court  
2 of Appeals.

3           **MR. CLOSIUS:** I disagree with that, Your Honor.

4           **THE COURT:** Oh... Well, all right. Here is what  
5 we're going to do. I took a long time to work through this  
6 because when I'm reversed, I want to know what I'm reversed on.  
7 And the impression that I have received -- it's not just an  
8 impression. I've gone through. They went to a lot of trouble  
9 at the Court of Appeals to give bullet points in the pleading  
10 as to where I went -- where I made a mistake. And now every  
11 one of those bullet points has been abandoned. And the Court  
12 of Appeals did say, you've got to pin the bad conduct on the  
13 NFL, not the clubs.

14           So we're going to take a break. Give my court reporter a  
15 chance to -- give you a chance to organize your thoughts, and  
16 then I'm going to let both of you respond to what I just went  
17 through.

18           But in addition, I'm going to give you a chance to respond  
19 to anything else that you want and then we -- on the motion.

20           All right. We'll take a 15-minute break. Thank you.

21           (Whereupon there was a recess in the proceedings

22           from 9:15 a.m. until 9:30 a.m.)

23           **THE COURT:** All right. Start with plaintiff. You  
24 have the floor and I'll try to be quiet.

25           **MR. CLOSIUS:** Thank you, your Honor.

1 Your Honor, I would first disagree with the  
2 characterization of why the Ninth Circuit reversed your  
3 opinion.

4 The Ninth Circuit reversed your opinion because they held  
5 that our claims were not dependent on anything in the CBA.  
6 They were not using CBA duty. They were not citing CBA's  
7 records or provisions. And that still is true with the Third  
8 Amended Complaint.

9 In addition, the Ninth Circuit clearly said -- and I can  
10 give you the page if you want -- that what had to happen -- I'm  
11 on Page 1121 and I'm quoting in that paragraph the last six or  
12 seven lines:

13 "Regardless of what, if anything, the CBAs say  
14 about those issues, if the NFL had any role" -- and  
15 I'm emphasizing any role -- in distributing  
16 prescription drugs, it was required to follow the law  
17 regarding those drugs."

18 **THE COURT:** I'm sorry. I want to read that. I  
19 believe it's there. I just want to mark it.

20 **MR. CLOSIUS:** Sure.

21 **THE COURT:** Where is that?

22 **MR. CLOSIUS:** Page 1121.

23 **THE COURT:** Yes. Which column?

24 **MR. CLOSIUS:** The carry-over, the same paragraph.  
25 It's the last -- if you go, like, the last ten lines, it says,

1 "regardless of what, if anything"?

2 **THE COURT:** Carry-over paragraph?

3 **MR. CLOSIUS:** Correct.

4 **THE COURT:** From Column 1 to Column 2?

5 **MR. CLOSIUS:** I don't have it that way on mine, Your  
6 Honor.

7 **MR. NASH:** I'm sorry. Which page are you on?

8 **THE COURT:** Oh, you mean, carry over from the prior  
9 page. Oh, oh, yes. I see. Yeah, I got it.

10 "Regardless of what, if anything, the CBAs say  
11 about these issues, if the NFL had any role in  
12 distributing prescription drugs, it was required to  
13 follow the laws regarding those drugs."

14 Well, but you don't allege any more that the NFL had any  
15 role in distributing prescription drugs.

16 **MR. CLOSIUS:** We do, Your Honor.

17 **THE COURT:** Well, what --

18 **MR. CLOSIUS:** Your Honor, if I could give you a  
19 slight overview of the --

20 **THE COURT:** It's just this thing about the plan. The  
21 business plan is to -- that's what you have been saying all  
22 along. Now that you're putting pressure on the clubs to -- for  
23 the clubs to distribute.

24 Well, where does the NFL itself distribute drugs?

25 **MR. CLOSIUS:** Your Honor, the NFL is involved in

1 every level of the drugs. They are involved in recordkeeping.  
2 They are involved in distributing. They are involved in  
3 everything. The Third Amended Complaint has many examples of  
4 NFL personnel involving the drugs.

5 If you could turn to Paragraph 194 for a minute?

6 **THE COURT:** All right. I got it right here. Let's  
7 see what you say.

8 **MR. CLOSIUS:** I'm going to read it exactly, Your  
9 Honor. Paragraph 194. And you see that there is a document  
10 produced by Dr. Brown, an NFL employee, he's the NFL's chief  
11 medical director, describing the NFL prescription drug program  
12 and protocol, which is a committee that's been in existence  
13 since 1973. It's dated April 1999 on its face. It was drafted  
14 to comply with regulations of the --

15 (Court reporter clarification.)

16 **MR. CLOSIUS:** Oh, I'm sorry.

17 It was drafted to comply with the regulations of the  
18 Federal Drug Enforcement Administration as they apply to  
19 controlled substances.

20 And I'm emphasizing with my tone:

21 "The program's main purpose" -- this is a quote  
22 -- "is to provide guidelines for the utilization of  
23 all prescription drugs provided to players and team  
24 personnel by physicians and other healthcare providers  
25 and associated NFL clubs" -- and I'm underlining this



1 now -- "and to ensure the proper handling" --

2 **THE COURT:** Mine says "appropriate handling." You  
3 said "proper."

4 **MR. CLOSIUS:** I'm sorry.

5 "...to ensure the appropriate handling (purchase,  
6 distribution, dispensing, administrating and  
7 recordkeeping.)"

8 The NFL is admitting in this memo that they are providing  
9 the guidelines for the distributions of the drugs.

10 **THE COURT:** That's not the same as distributing the  
11 drugs.

12 **MR. CLOSIUS:** Your Honor --

13 **THE COURT:** That's distributing by the clubs; right?

14 **MR. CLOSIUS:** They are telling them how to distribute  
15 it. They are providing guidelines on how to do it.

16 **THE COURT:** Yes. That's what you're alleging here,  
17 but it's not the same as the NFL itself handling, physically  
18 handling the drugs.

19 **MR. CLOSIUS:** Your Honor, if you're asking --

20 **THE COURT:** That's what the controlled substances law  
21 requires.

22 **MR. CLOSIUS:** If you're asking me did we allege  
23 whether anyone from the NFL physically handed pills to the --  
24 to a player, the answer is yes. It's Dr. Elliot Pellman. And  
25 we cover that on paragraphs -- I'm sorry. I have it here.

1 We cover that on Paragraph 1183 where we identify Pellman  
2 as an NFL medical advisor.

3 And then on Paragraph 210 we talk about the drugs that  
4 were delivered to the plaintiffs -- that were delivered to  
5 players by the Jets. Pellman is also a Jet team doctor.

6 **THE COURT:** Okay. I want to make sure I got this,  
7 because this is new. I did not know that you had an NFL person  
8 distributing drugs directly to somebody. So let's go through  
9 that.

10 **MR. CLOSIUS:** Paragraph 1.

11 **THE COURT:** One?

12 **MR. CLOSIUS:** Paragraph 1. We identify Elliot  
13 Pellman, Dr. Elliot Pellman, as a New York Jets team physician  
14 and as the NFL -- one of the NFL medical advisors. He was 30  
15 years employed by the NFL and the Jets.

16 **THE COURT:** So --

17 **MR. CLOSIUS:** We have other places where we refer to  
18 him.

19 Then turn to Paragraph 210.

20 **THE COURT:** Wait. Paragraph 210.

21 All right.

22 **MR. CLOSIUS:** And there we give you the volume of  
23 drugs that were distributed by the New York Jets. I'll read  
24 you the numbers if you want, but you see what you have there.

25 **THE COURT:** Let me read it out loud.

1 "For the Jets at least, the usage of Toradol and  
2 Vicodin exploded between 2004 and 2009. In a  
3 January 26, 2010 email from David Zuffelato to John  
4 Mellody and Joshua" -- how do I say that? K-O-C-H.  
5 Koch? Koch? All right -- "he provides a chart  
6 showing that in the 2008 season the Jets dispensed  
7 1,031 doses of oral and injectible Toradol and 1,295  
8 doses of Vicodin, and that in the 2009 season their  
9 usage of Toradol increased" -- et cetera, et cetera.  
10 I won't read it all.

11 "On information and belief the Jets are an  
12 average NFL Club in terms of their Vicodin and Toradol  
13 usage during the times identified."

14 Okay. So what is your point there? That's all about the  
15 Jets.

16 **MR. CLOSIUS:** He was involved, Your Honor. He was a  
17 Jet team doctor also. He was both an NFL employee and a Jet  
18 team doctor. So we have an NFL employee who was distributing  
19 the pills to players.

20 **THE COURT:** Well, 210 does say that the "Jets  
21 dispensed." That word is right there. Dispensed these doses,  
22 but I don't see -- I don't see his name anywhere in there.

23 I see Pellman's name in Paragraph 1 saying that he -- just  
24 who he is, a Jets doctor and an NFL medical advisor.

25 And then you also have him in Paragraph -- I could have

1 sworn I had it.

2 **MR. CLOSIUS:** He is an influential figure in the NFL.  
3 We refer to him a number of times in various memos and  
4 documents produced in discovery. But he's also the Jet team  
5 doctor.

6 So at the same time he's distributing pills directly to  
7 the players.

8 **THE COURT:** So --

9 **MR. CLOSIUS:** Your Honor, look at Paragraph --

10 **THE COURT:** All right. Is that the best you've got,  
11 or is there more?

12 **MR. CLOSIUS:** That's the only example we have at this  
13 point of an NFL person physically handing a pill to a player,  
14 yes.

15 Your Honor, if you look at Paragraph 11, we have a  
16 memorandum there from an NFL doctor, an NFL employee, and in  
17 Paragraph 11 it -- one of the documents from 2014, he says:

18 "The NFL has joint culpability regarding the  
19 distribution and problem of the opioids."

20 The NFL people themselves are admitting that they are in  
21 this; that they are involved.

22 **THE COURT:** Let's see, Paragraph 11. Is that the one  
23 you're referring to?

24 **MR. CLOSIUS:** Yes.

25 **THE COURT:** Someone named Dr. McClellan. Who is

1 McClellan again?

2 **MR. CLOSIUS:** McClellan works with Dr. Brown.  
3 Dr. Brown is the chief medical officer of the NFL.

4 **THE COURT:** And Dr. McClellan is what for the NFL?

5 **MR. CLOSIUS:** Dr. McClellan is a subordinate to  
6 Dr. Brown. At least he was at the time.

7 **THE COURT:** Okay.

8 **MR. CLOSIUS:** Look at the last line in Paragraph 11.

9 **THE COURT:** Let me read the whole thing, including  
10 that last sentence.

11 "The next issue Dr. McClellan addresses is,  
12 quote, Pain Relieving Medications and Competitive  
13 Football, close quote, about which he makes two  
14 points. One, quote, opioids and other non-opioid pain  
15 medications are demonstrably effective in the short  
16 term for relieving most forms of skeletal and muscular  
17 pain so often experienced by NFL players, close quote;  
18 and (2), quote, for these reasons appropriate properly  
19 prescribed and monitored as well as inappropriate  
20 opioid and non-opioid pain medication use are both  
21 more common among NFL players, close quote. His  
22 takeaway point on this issue, quote, it is in the  
23 players' the teams' and the league's reputational and  
24 financial interest to use analgesic medications for  
25 pain relief. These incentives and the nature of the

1 sport combined to make opioid and other pain  
2 medication usage much more prevalent in the NFL than  
3 in virtually any other industry, population or  
4 endeavor. This really means that there is a shared  
5 responsibility and joint culpability for the problem."

6 Okay. All right. So that -- that is a -- I take your  
7 word for it. He's an NFL employee. I assume you agree.  
8 McClellan is an NFL employee?

9 **MR. NASH:** No, Your Honor. And there is no  
10 allegation in the Third Amended Complaint that he is.

11 **THE COURT:** Well, he just got through telling me that  
12 he works for the doctor for the NFL.

13 **MR. NASH:** He said he's an associate. He's an  
14 independent doctor who wrote this paper and it was provided to  
15 the doctor, to Dr. Brown, in an advisory capacity.

16 I believe he may have served on an advisory committee to  
17 the NFL, but I --

18 **THE COURT:** Well, where does the -- right now I'm  
19 just sticking with what's in the Third -- where in your Third  
20 Amended Complaint is this fellow McClellan identified?

21 **MR. CLOSIUS:** He's identified as an associate in  
22 Paragraph 9.

23 **THE COURT:** All right. Here we go.

24 "The business plan is best exemplified by a  
25 single page document produced in evidence that was

1 prepared in 2014 by Dr. Thomas McClellan, an associate  
2 of Dr. Lawrence Brown, titled the Role of League-Wide  
3 Incentives in Promoting the Opioid Use Problem, the  
4 need for League-Wide collaboration to solve the  
5 problem."

6 And I don't know what "associate" means. Where do we  
7 identify who Brown is?

8 **MR. CLOSIUS:** Brown is the chief medical officer of  
9 the NFL.

10 **THE COURT:** All right. Where is that stated here?  
11 Is that in Paragraph 1?

12 **MR. CLOSIUS:** That's in Paragraph 1, Your Honor.

13 **MR. NASH:** If I could correct counsel.

14 **THE COURT:** Yes, go ahead.

15 **MR. NASH:** He's not the chief medical officer of the  
16 NFL. He is the medical advisor who has been retained by the  
17 NFL and the NFL Players Association to oversee the NFL's  
18 collectively bargained drug program and he is an advisor to the  
19 NFL. He's not the chief medical officer.

20 **THE COURT:** Well, the Complaint identifies him as  
21 Dr. Lawrence Brown (NFL medical advisor on prescription drugs  
22 since the early 1990s).

23 **MR. CLOSIUS:** Your Honor, I would concede sometimes  
24 they refer to him as medical director and sometimes medical  
25 advisor. That's true.

1 He's involved in the prescription drug program, not the --  
2 Dr. Lombardo is the doctor who is in charge of the steroid and  
3 performance enhancing drug area of the NFL.

4 **THE COURT:** Well --

5 **MR. CLOSIUS:** Brown is responsible for the  
6 prescription drug protocol I talked to you about in  
7 Paragraph 194.

8 **THE COURT:** Just a minute. No. 9 says that McClellan  
9 is an associate. Now, what does that mean?

10 **MR. CLOSIUS:** Your Honor, we're not sure. Whether he  
11 was an employee in the NFL, an independent contractor who was  
12 working for the NFL. He clearly was associated with Dr. Brown,  
13 who is an NFL employee, and he clearly is writing a memo for  
14 the NFL, just by the title.

15 **THE COURT:** Do one of you have this document here,  
16 this -- this single page document produced in evidence?

17 **MR. CLOSIUS:** We don't have it here, Your Honor.

18 **THE COURT:** Well, an associate could simply be  
19 somebody who practices in the same clinic and wrote -- wrote  
20 this memo about the -- maybe he wrote it for the NFL, but --

21 **MR. CLOSIUS:** This was produced by the NFL -- by the  
22 Clubs in evidence. We didn't subpoena McClellan and get it  
23 from him.

24 **THE COURT:** So where does it -- where does that memo  
25 say that the NFL is directly handing drugs to players?



1           **MR. CLOSIUS:** It doesn't, Your Honor. It simply says  
2 that they are jointly culpable for the opioid problem the NFL  
3 is facing.

4           **THE COURT:** The Ninth Circuit didn't say that.

5           **MR. CLOSIUS:** The Ninth Circuit didn't say --

6           **THE COURT:** The Ninth Circuit said that you've got to  
7 show direct involvement in the distribution of the drugs.

8           **MR. CLOSIUS:** Your Honor, I don't see where they said  
9 that. I don't think the Ninth Circuit ever said that we had to  
10 prove that an NFL employee was handing pills to players.

11           **THE COURT:** Or handing them to the Clubs. If the NFL  
12 was -- the impression you left with the Ninth Circuit was there  
13 was a room in New York called the Security Office that was full  
14 of drugs.

15           **MR. CLOSIUS:** That's not true, Your Honor.

16           **THE COURT:** Come on. That's the way I read it.

17           **MR. CLOSIUS:** That may be the way you read it --

18           **THE COURT:** That's what you convinced them of, and  
19 then they said okay. They are right there in the chain of  
20 distribution so, therefore, these drug laws -- see, the  
21 Controlled Substances Act is very clear. The physical tracking  
22 of those drugs is what the Controlled Substances Act covers,  
23 among a lot of other things.

24           But you left the impression with the Ninth Circuit that  
25 there were physical custody by the NFL of these drugs in New

1 York at the Security Office and that somehow maybe the next  
2 step was they were then sent out to Cleveland and sent out to  
3 Chicago to the Clubs.

4 To me, that's preposterous that there would be such a  
5 thing. It's conceivable. That's why I asked the question.  
6 But to me, the individual Clubs are getting the drugs on their  
7 own and handing them out to the players.

8 **MR. CLOSIUS:** Your Honor, with all respect, that's  
9 not what happened in front of the Ninth Circuit. If you review  
10 the transcript of that argument, you will find I never said  
11 that the NFL was handing physical pills to players.

12 **THE COURT:** All right. What do you think accounts  
13 for the way they worded their own opinion? All those bullet  
14 points?

15 **MR. CLOSIUS:** I think the bullet points are all still  
16 in the Third Amendment Complaint, except for the last one, "The  
17 NFL made knowing and intentional misrepresentations." We  
18 dropped the claim for intentional misrepresentation.

19 The NFL is directly involved and indirectly involved in  
20 everything that's mentioned in those bullet points.

21 As mentioned on 194, Your Honor --

22 **THE COURT:** You know, they said that what the Clubs  
23 are doing, you can't -- that you should not be suing the NFL  
24 for what the Clubs themselves are doing.

25 **MR. CLOSIUS:** We're not, Your Honor. We are talking

1 about what the NFL is doing.

2 The NFL is telling them how to keep the records. The NFL  
3 is telling them where to store the drugs. The NFL is giving  
4 them guidelines on how to distribute it. I could keep going  
5 on, but that's the Third Amended Complaint.

6 Your Honor, I will give you an example. In 174 in the  
7 Complaint, Paragraph 174, the NFL stops. The NFL tells people  
8 they don't have to report Toradol and Vicodin any more.

9 And then on 207 and 211, what a shock. Toradol and  
10 Vicodin use explodes under the Clubs.

11 **THE COURT:** Wait, wait. Let me find it. I want to  
12 read it. 174?

13 **MR. CLOSIUS:** Yes, please.

14 **THE COURT:** Paragraph 174.

15 "On the same day Brad C. Brown, PFATS  
16 Secretary" --

17 I'm sorry, I don't know what that means. What does that  
18 mean? PFATS, what is that?

19 **MR. CLOSIUS:** That's the physicians society.

20 **THE COURT:** Okay.

21 **MR. CLOSIUS:** I'm sorry. It's the trainers society.

22 **THE COURT:** All right.

23 "Secretary, kept the minutes of a PFATS winter  
24 meeting held at the Combine in Indianapolis. Those  
25 minutes reflect that Dean Kleinschmidt" -- who is he?

1           **MR. CLOSIUS:** Trainer. Minnesota Vikings.

2           **THE COURT:** (Continuing):

3           "...reported to the group assembled (open to all  
4 NFL trainers) on the meaning of the Drug Abuse  
5 Committee as follows."

6           Quote:

7           "Those athletic trainers have to -- those  
8 athletic trainers that have to contend with the NFL  
9 drug audit, the committee has determined that the  
10 special care given to Toradol and Vicodin in the  
11 reporting will no longer be necessary, as these two  
12 drugs have not shown any significant problem. In  
13 other words, at the same time the Tokish Study is  
14 calling for more study and the K.C. document is  
15 advising of the risks associated with Toradol, the NFL  
16 collective decided to stop reporting about it."

17          Is this reporting to the NFL or --

18           **MR. CLOSIUS:** The NFL requires reports on all the  
19 drugs to be made by the Clubs to NFL personnel. Dr. Brown  
20 supervises the compilation of that data.

21          And then, Your Honor, if you want to look at 207 to 211,  
22 that's where we talk about the explosion of Toradol and Vicodin  
23 as soon as the NFL said they didn't have to report it any more.

24          So the NFL is implicitly telling these people they can  
25 continue to abuse Toradol and Vicodin.

1           **THE COURT:** Say it again. 207?

2           **MR. CLOSIUS:** 207 to 211.

3           **THE COURT:** We looked at that a minute ago, didn't  
4 we? Yeah, 210.

5           "For the Jets at least the usage of Toradol and  
6 Vicodin exploded," et cetera.

7           **MR. CLOSIUS:** The NFL -- the NFL where Dr. Pellman is  
8 an employee decides that they are not going to report Toradol  
9 and Vicodin and then Dr. Pellman with the Jets explodes the use  
10 of Toradol and Vicodin. The NFL is directly -- and it explodes  
11 across the League, Your Honor.

12           **THE COURT:** All right. Let's -- I'll give you a  
13 chance to keep going. Hang on. But I want to give the other  
14 side a chance to reply to the -- each individual.

15           So we've gone over a number of points made by plaintiff  
16 with the idea that -- to show the NFL has direct involvement in  
17 the -- in these drugs.

18           So I want you to -- I want to hear what you have to say.  
19 And don't just repeat the questions that I have asked. That  
20 won't do me any good. I want you to be more specific and  
21 explain what's wrong with counsel's argument.

22           Please go ahead.

23           **MR. NASH:** Thank you.

24           Let me start with what counsel said that he told the Ninth  
25 Circuit. And he -- he said that they didn't tell the Ninth

1 Circuit that the NFL was providing the drugs.

2 Here is the first sentence of their appeal brief:

3 "For decades the National Football League  
4 supplied controlled substances and prescription drugs  
5 to its players."

6 They go on at page -- later in their brief --

7 **THE COURT:** Give us the docket so my Law Clerk can  
8 write it down.

9 **MR. NASH:** This is their brief before the Ninth  
10 Circuit. It's docket entry 22-1.

11 **THE COURT:** Read the exact -- read it exactly.

12 **MR. NASH:** It's case 15-15143.

13 **THE COURT:** Read the sentence exactly.

14 **MR. NASH:** Oh, the sentence. I'm sorry.

15 "For decades the National Football League  
16 supplied controlled substances and prescription drugs  
17 to its players in amounts, e.g. number of injections,  
18 in a manner without a prescription and failure to warn  
19 of side effects that violated federal and state law."  
20 That's what they told the Ninth Circuit.

21 **THE COURT:** All right.

22 **MR. NASH:** They told the Ninth Circuit that because  
23 their argument was that this Court's ruling that it understood  
24 their Complaint, as the NFL's failure to either properly  
25 supervise the Clubs' medical care or to intervene, was not

1 their claim. They said our claim was based on illegality.

2 And counsel just mentioned the transcript of the hearing.  
3 I would invite the Court, if it had the time, to listen to it.

4 In fact, Judge Bybee expressed the same skepticism, Your  
5 Honor, that you just did. It seemed implausible that the NFL  
6 would be providing drugs directly to the players. But he --  
7 and as the opinion shows, that that sounded more like a Rule 12  
8 issue for the District Court to resolve.

9 **THE COURT:** Is there a transcript available of the  
10 oral argument?

11 **MR. NASH:** There is. And it's cited in plaintiff --  
12 it's cited in plaintiffs' opposition to our motion.

13 **THE COURT:** The entire transcript?

14 **MR. NASH:** It's a video transcript I believe, yes.  
15 It's not a transcript. It's a video, I believe. I don't think  
16 there is a transcript, but we could endeavor to get one.

17 **THE COURT:** Well, all right. Continue. What else do  
18 you want to say?

19 **MR. NASH:** But so just to correct something I think  
20 that counsel said. He pointed to one of the paragraphs as  
21 supporting the allegation that Dr. Pellman handed a drug to a  
22 player. That doesn't -- there is nothing in the Third Amended  
23 Complaint that alleges that Dr. Pellman supplied any player,  
24 nor is there any --

25 **THE COURT:** Well, no. That is true. It's true that

1 there is no direct allegation that he himself handed any drugs  
2 to them.

3 But what is alleged is that that team gave drugs to its  
4 players and that he, Pellman, had a medical role in connection  
5 with that team. Therefore, the argument is it could be  
6 inferred that Pellman did it.

7 And then further it's argued that Pellman had a second hat  
8 advising the NFL and, therefore, that -- from that second  
9 inference it could be inferred that the NFL was the one handing  
10 the drugs to the players. I think that's the argument.

11 So do you -- I recognize it doesn't flat out say that he  
12 handed any drugs, but would that be a permissible inference?

13 **MR. NASH:** I think the Ninth Circuit required so much  
14 more than that, Your Honor. And that was going to be my second  
15 point.

16 Regardless of whether they could even allege that a doctor  
17 that had some association with the NFL was involved in or  
18 handed a drug, the Ninth Circuit made very clear, and they did  
19 so based on their -- plaintiffs' arguments, that they would  
20 have to plead that the NFL actually was covered by the statutes  
21 and violated those statutes. And the reason that the Ninth  
22 Circuit made that express holding was because as they  
23 understood the argument and the challenge to this Court's  
24 ruling, you didn't need to interpret the collective bargaining  
25 agreement to determine whether the NFL had violated the law.



1 In fact, the way they put it was what's reasonable --  
2 we're not relying on traditional negligence theories of  
3 reasonableness. What they said was -- and this is Page 31 of  
4 the brief I just cited:

5 "Plaintiffs' claims do not require the Court to  
6 weigh whether the NFL's actions were reasonable. What  
7 is reasonable is required by statute. This case does  
8 not involve the type of common law analysis that made  
9 tort claims under *Stringer* and *Duerson*" -- and they  
10 are talking about the cases this Court relied on in  
11 the preemption argument -- "dependent on the CBAs."

12 So I think it was absolutely clear.

13 And then to just sort of make a final point, going back to  
14 the *Dent* decision itself. The reason we know that the Ninth  
15 Circuit required plaintiffs to prove much more than what they  
16 are saying here and why the -- why the Third Amended Complaint  
17 doesn't come close is that the Ninth Circuit explained why, as  
18 it understood plaintiffs' claims, they could be resolved  
19 without CBA interpretation.

20 And I won't read all of it, but there is a paragraph that  
21 starts at the end of 1121 and it goes over to Page 11- -- 1120,  
22 I apologize, and it goes over to Page 1121. And in each case  
23 the Ninth Circuit explains that the reason why you don't have  
24 to interpret the CBA in analyzing the claims, at least as they  
25 told them the claims were, is that the issue was the NFL's

1 violation of the law.

2 Now, one of the things that we haven't talked about at all  
3 is we demonstrated, I believe, in our motion -- and I think you  
4 were alluding to it before when you talked about the Controlled  
5 Substances Act -- the Third Amended Complaint does not allege  
6 any violation by anyone at the NFL of any of the statutes. We  
7 explained that in our motion. I don't even think in their  
8 opposition they attempted to challenge it.

9 Instead they pivoted back to arguments about  
10 reasonableness and things like that that goes to the heart of  
11 the reasons why this Court originally held the claims to be  
12 preempted. They could not identify anywhere in the Third  
13 Amended Complaint where they allege even that the NFL violated  
14 any of the statutes.

15 And, in fact, if you -- if you actually look at their  
16 allegations about the statutes, it becomes crystal clear. They  
17 have this whole section about the statutes in the Complaint  
18 starting at Page 42. It's starting really with Paragraph 118.  
19 And this sort of bolsters the point that you were making.

20 When they talk about the Controlled Substances Act,  
21 they -- they say:

22 "The Controlled Substances Act criminalizes the  
23 dispensation and possession of medications that the  
24 NFL routinely gives players."

25 There is no allegation that the NFL dispensed, possessed,

1 or gave any players.

2 **THE COURT:** All right. Well, but the argument I  
3 think is like in a criminal case, the kingpin may be careful  
4 enough never to have drugs in their possession. In fact, the  
5 drugs will be down at the street level or at some stash house  
6 or someplace where the kingpin never has to go.

7 So let's say the kingpin never touches the drugs. Never  
8 has physical possession, but controls the whole enterprise.  
9 Under your argument the Government couldn't put the kingpin in  
10 jail because they don't touch the drugs. That can't be right.

11 **MR. NASH:** That's not my argument.

12 **THE COURT:** Well, then help me understand why -- how  
13 you distinguish the two cases.

14 **MR. NASH:** Because although they use words like  
15 "kingpin" in their opposition motion, there is not a single  
16 allegation anywhere in the Complaint of the NFL directing any  
17 doctor, any Club, any trainer, to give a medication to a player  
18 in disregard of his health, to do anything that violates any of  
19 the statutes that they cite in the Complaint. There is no  
20 allegation whatsoever.

21 In fact, your Honor, and this goes to the -- I think the  
22 way that I could best explain this is I think it's important to  
23 distinguish between what the plaintiffs themselves say caused  
24 their injuries or were the proximate cause of their injuries  
25 and what they say the NFL did.

1       So in the very beginning of the Complaint, this is what  
2 they say at Paragraph 15 of the Complaint. They claim that:

3               "The players were provided with medications that  
4 were often administered without a prescription or side  
5 effects warnings, with little regard for the player's  
6 medical history, potentially fatal interactions with  
7 other medications or the actual health and recovery  
8 from the injury of the plaintiffs."

9       And then each named plaintiff recounts what their  
10 complaint is.

11       And just as an example, Richard Dent, the lead plaintiff,  
12 at Paragraphs 21 to 27 he explains what his claim is. He says  
13 he received medications, not from the NFL, from team doctors  
14 and trainers for several of the teams that he played on and  
15 that the person providing the medication did not identify the  
16 dosage or provide the statutory required warnings and side  
17 effects.

18       Now, what he also says, and what every single plaintiff in  
19 the case says, the cause of his injuries that he's seeking  
20 damages for was, quote:

21               "The wrongful distribution and administration of  
22 medications by his Clubs."

23       Not that the NFL funded a study or had a program. It was  
24 absolutely that is the cause. There is no question.

25       Now, you turn --

1           **THE COURT:** But wait. Doesn't the Complaint go on --  
2 or does it, I'm asking -- to further say, well, the reason that  
3 the Clubs did this is because of a business plan that the NFL  
4 imposed on the Clubs to maximize playing time and maximize  
5 profits and the way the Clubs carried that out was by giving  
6 too many drugs to the players. Doesn't the Complaint say that?

7           **MR. NASH:** They say that in conclusory fashion and  
8 they offer no allegations of that ever happening. Not one  
9 specific allegation in the Complaint.

10          **THE COURT:** Was there such a thing as the, quote,  
11 Business Plan or is that a term of art used by the plaintiff?

12          **MR. NASH:** As far as I know, it's something that was  
13 put in caps, capital letters, but there is no -- they --

14          **THE COURT:** I thought at first it was like the  
15 by-laws, that the by-laws had all this in it, but is that -- is  
16 there such a document as the Business Plan?

17          **MR. NASH:** Absolutely not. And there is no  
18 allegation that there is. It's purely -- it's counsel's legal  
19 theory to support the argument of trying to hold the NFL  
20 accountable for what they say happened at the Club level.

21          But, Your Honor, I think the critical point there is the  
22 Ninth Circuit couldn't have been clearer that in order to plead  
23 your claims against the NFL for negligence, the plaintiffs  
24 can't rely on what the Club doctors and trainers did. Yet, in  
25 the Third Amended Complaint that's exactly what each and every

1 plaintiff does.

2 And to make that crystal clear, they even attached to  
3 their Complaint Exhibit A, which is a chart which they say  
4 recounts each plaintiff's experience and in that chart they  
5 identify Club doctors and trainers. They don't identify anyone  
6 from the NFL.

7 Now, the only thing that they do do in these -- in each of  
8 the plaintiff's claims is they describe the doctors as NFL  
9 doctors, but it is absolutely clear and -- from what they say  
10 and even from their Exhibit A that what they are talking about  
11 are the Club doctors. They just have thrown that label "NFL  
12 doctors." And that's what the Ninth Circuit said they couldn't  
13 do. They were conflating the Club personnel with the NFL  
14 personnel.

15 Now, the only other point I would make is when you take  
16 out the conduct that forms the basis of the plaintiffs' claims,  
17 and maybe even more importantly, Your Honor, the conduct that  
18 plaintiffs themselves say caused their injuries, what you're  
19 left with are really a failure to supervise or failure to  
20 intervene claim. That's the claim that this Court held was  
21 preempted. The Ninth Circuit did not call that into question  
22 at all.

23 And that is made clear when you look at the specific  
24 allegations that they make about the NFL. They spend a great  
25 deal of time talking about something called the Matava Study.

1 They say the NFL funded studies relating to the medication.  
2 Sure. We take that as true.

3 In their own Complaint they say, what were the purpose of  
4 those studies? It's at Paragraph 176 of the Third Amended  
5 Complaint. The purpose of the study was to decrease the risk  
6 to the players. Not direct players -- not direct doctors to  
7 get players back on the field for some Business Plan.

8 All of the conduct actually that they specifically  
9 attribute to the NFL, and it's in the section called the "NFL  
10 Voluntarily Undertook Duties" here, all of it was to reduce  
11 risk, not increase risk.

12 But maybe more importantly, there is nothing there that  
13 remotely alleges the NFL directed any Club to disregard the  
14 players' health and get them back on the field with  
15 medications.

16 And maybe most importantly for the purposes of the Ninth  
17 Circuit's decision, there is absolutely nothing in those  
18 allegations that pleads a violation by anyone at the NFL of any  
19 of the statutes.

20 And, again, you can go through -- I've gone through the  
21 Third Amended Complaint many times. They don't even try to  
22 allege it.

23 And when we explained, as you did earlier, that statutes  
24 like the Controlled Substances Act are technical statutes, and  
25 the allegations that even could be remotely attributable to the

1 NFL in the Complaint don't come close to that, they don't even  
2 challenge that, Your Honor.

3 **THE COURT:** All right. I want to give plaintiff -- I  
4 want to give you a chance to go over at least one more specific  
5 allegation that ties the -- not just ties in. That shows the  
6 NFL is supplying drugs directly out of this locker in New York,  
7 or wherever it is that you think the NFL is hiding the drugs,  
8 or as close as you can get to that.

9 To me, that's -- I'm reading what happened in the Ninth  
10 Circuit as that's what they believe you were alleging. And I  
11 think you are trying to slide off of what you told the Ninth  
12 Circuit.

13 But I want you to -- I'm going to give you a chance to go  
14 through yet another example, and then you can respond to what  
15 counsel just said, too.

16 **MR. CLOSIUS:** Your Honor, the bullet point in the  
17 Ninth Circuit opinion you're referring to says that:

18 "Medications are controlled by the NFL Security  
19 Office in New York."

20 That doesn't say that they have a stash of drugs in New  
21 York and they are distributing out of the office. That was  
22 never said. That was never alleged.

23 The NFL Security Office does control the medications in  
24 the sense that they are telling them where to store it, how to  
25 store it, how to comply. They tell them when they have to get



1 DEA registrations. Those are all in the Complaint, Your Honor.

2 **THE COURT:** Well, look. I went back and read the 210  
3 in your Second Amended Complaint to see what the spin was that  
4 was put on the Security Office. I read it earlier. And it --  
5 the spin that was put on 210 by you was susceptible to the  
6 reading that the drugs were being dispensed out of New York.

7 **MR. CLOSIUS:** I don't -- I will read 210 again, Your  
8 Honor, if you'll give me a second.

9 **THE COURT:** I will read it out loud.

10 "Upon information and belief the practice of mass  
11 ordering in a player's name no longer occurs. Instead  
12 medications are controlled by the NFL Security Office  
13 in New York, which has implemented tighter controls in  
14 the last decade according to one former trainer who  
15 for years was a member of the NFL's Committee on  
16 Performance Enhancing and Prescription Medications.  
17 In addition, according to a 2013 *Washington Post*  
18 article titled Pain and Pain Management in NFL Spawn a  
19 Culture of Prescription Drug Use and Abuse, close  
20 quote, the NFL contracted with an independent vendor  
21 SportPharm to track and log the extensive amounts of  
22 medication dispensed to teams."

23 That phrase "medications dispensed to teams" in the same  
24 paragraph as the "NFL Security Office" is susceptible to the  
25 implication that the NFL Security Office is -- was dispensing

1 medications to teams.

2 Now, I think that's -- it doesn't -- it doesn't literally  
3 say -- this is maybe where you escape Rule 11 problems. It  
4 doesn't literally say that the drugs were stored in a locker at  
5 the NFL Security Office and carried from there to the Clubs.  
6 That probably would have been a Rule 11 violation. But you  
7 came very close to that by putting this *Washington Post*  
8 article, putting in the statement "extensive amounts of  
9 medication dispensed to teams" right after a sentence about the  
10 NFL Security Office. No wonder the Ninth Circuit thought that  
11 you were saying that the NFL Security Office was dispensing  
12 drugs right out of New York.

13 Well, okay. I know you're going to say -- you're going to  
14 say no, no, you didn't mean that. That's not what you --

15 **MR. CLOSIUS:** That's not what I was going to say,  
16 Your Honor. I was going to ask you to tell me where in the  
17 *Dent* opinion it says they were dispensing drugs out of the  
18 office in New York.

19 **THE COURT:** All right. Here is what -- it doesn't  
20 say that. It comes close to that though.

21 What it says is, there is a lead-in sentence to the bullet  
22 points and the lead-in says, quote:

23 "But the players' Second Amended Complaint  
24 asserts that the NFL itself directly provided medical  
25 care and supplied drugs to players."

1 That's what -- the lead-in.

2 And then there is seven bullet points, one of which is:

3 "Medications are controlled by the NFL Security  
4 Office in New York."

5 So if you read all seven plus that lead-in, I think they  
6 were under the impression that you had alleged that NFL itself  
7 directly provided medical care and supplied drugs to players.  
8 And now you're sliding off of that to say, well, the Clubs do  
9 it, but the NFL controls how they do it. And that's the --  
10 that was the original theory that was preempted.

11 All right. But if -- look, I've spent a lot of time on  
12 this trying to understand how this -- how we got to where we  
13 are. And to me, I am going to hold you to what the Ninth  
14 Circuit said, which is you've got to show that the NFL itself  
15 directly provided medical care and supplied drugs to players.  
16 That's what I think the Ninth Circuit is insisting on in this  
17 opinion.

18 So I want to give you a chance, because I know what will  
19 happen if I were to throw this case out. You would go up on  
20 appeal and say, well, you did try to show where they, NFL  
21 itself directly. And then you will say that I didn't listen to  
22 what -- I want to hear the examples where this pleading meets  
23 that standard, "NFL itself directly provided medical care and  
24 supplied drugs to players."

25 You gave me one example of Pellman. I'm not sure it

1 really is a good example, but that's the kind of thing. I want  
2 to give you another opportunity to show me more of those  
3 examples.

4 **MR. CLOSIUS:** Your Honor, if you're asking me more  
5 examples of where an NFL employee handed a pill or handed a  
6 drug to a player, I don't have any more. That's all I have.

7 **THE COURT:** I'm asking for examples where the NFL  
8 itself directly provided medical care and supplied -- and/or  
9 supplied drugs to players.

10 **MR. CLOSIUS:** Your Honor, in our view the NFL is  
11 controlling all of this. The NFL approves -- on 179 we alleged  
12 that the NFL approves the Club's hiring of the doctors. The  
13 NFL reviews all of their financial arrangements and they have  
14 to approve it. The NFL is all over this in every aspect,  
15 except for Pellman, handing the pill.

16 Your Honor, your El Chapo analogy is exactly right here.

17 **THE COURT:** My what?

18 **MR. CLOSIUS:** Your drug dealer, I'm sorry. Your drug  
19 kingpin analogy.

20 I mean, if this were true, every drug kingpin -- they  
21 don't convict drug kingpins because they find them selling  
22 nickel bags on the Embarcadero.

23 Your Honor, if we want to get into it, I guess we can talk  
24 about Doctrine of Constructive Delivery, which is part of the  
25 Controlled Substances Act, or we can talk about the Corporate

1 Responsibility Doctrine, which is part of the Food, Drug and  
2 Cosmetic Act. It's not the case that you can only violate both  
3 of these statutes by physically handing a pill to a player.

4 And, Your Honor, further if we're parsing the language of  
5 the Ninth Circuit opinion in *Dent*, if you go to -- I'm sorry.  
6 If you go to Page -- I always have trouble finding the numbers  
7 when I want to. I'm sorry. It's on Page 1119. They are  
8 assuming that the Ninth Circuit is using "distribution  
9 administration" in the technical to term of art as defined  
10 under the Controlled Substances Act. We're not sure that  
11 that's not true, Your Honor.

12 Also, if you're looking at it, "Applying the rolling  
13 factors" -- I'm in a paragraph I can't tell exactly where it  
14 is, but it's on 1119.

15 "Applying the rolling factors, lack of reasonable  
16 care in the handling, distribution and administration  
17 of controlled substances."

18 Where does "handling" come from?

19 **THE COURT:** I'm sorry. I'm at 1119, but I don't see  
20 where you're reading.

21 **MR. CLOSIUS:** If you go on 1119, there is a paragraph  
22 that starts here "Any Duty to exercise reasonable care."

23 **THE COURT:** All right.

24 **MR. CLOSIUS:** If you go, I don't know, about ten  
25 lines down from that. After the cite to the "See J.R.

1 Corporation."

2 **THE COURT:** All right.

3 **MR. CLOSIUS:** (As read)

4 "Applying the rolling factors lack of reasonable  
5 care in the handling, distribution and  
6 administration."

7 And if you go through the rest that page, they use  
8 "handling" frequently.

9 So go to the paragraph that says "of course" and look to  
10 about six lines from the bottom of that paragraph.

11 "Therefore, under plaintiffs' negligence per se  
12 theory whether the NFL breached its duty to handle  
13 drugs with reasonable care can be" --

14 **THE COURT:** That says "handle."

15 **MR. CLOSIUS:** I understand that. I'm not -- we're  
16 using this word "distribute" as it literally is defined in the  
17 Controlled Substances Act.

18 I guess I'm suggesting the Ninth Circuit may not have been  
19 that precise. They are using the word "handle." And as  
20 "handle" is defined by the NFL itself in that quote I read you  
21 from Paragraph 194, handling includes recordkeeping, storage,  
22 all kinds of stuff.

23 So, I mean, the Ninth Circuit is using all kinds of  
24 phrases here, Your Honor. They are focusing in on one,  
25 distribution. Handling is not used in either statute.

1           **THE COURT:** I think the Court of Appeals, the way I  
2 read it, it was referring to physical, physical distribution.

3           **MR. CLOSIUS:** I understand you're reading it that  
4 way, Your Honor. We're not.

5           **THE COURT:** Well --

6           **MR. CLOSIUS:** And the paragraph you referred to of  
7 the Second Amended Complaint, that also; right? The NFL  
8 dictated to all the Clubs they had to use SportPharm and buy  
9 their tracking software so they could track the reporting of  
10 the drugs. That's all coming from the NFL.

11           They tried to tell them they had to buy the stuff through  
12 SportPharm, but then SportPharm had their license removed for  
13 illegal distribution.

14           **THE COURT:** The Ninth Circuit said:

15           "Therefore, on remand any further proceedings in  
16 this case should be limited to those claims arising  
17 from the conduct of the NFL and NFL personnel - not  
18 the conduct of individual team's employees."

19           **MR. CLOSIUS:** We agree with that. We've complied  
20 with that. We focus on the conduct of the NFL.

21           I mean, admittedly there are emails involving doctors and  
22 trainers. I understand that because they are on the other end  
23 of the -- of whatever is being sent out.

24           We're focusing what the NFL does. The NFL controls all of  
25 it. They control reporting. They control how to safeguard it.

1 They mandated registration of the facilities. They mandated  
2 that the doctors get register -- certification numbers. They  
3 told them they had to order through SportPharm. They attend  
4 meetings with the doctors. They are doing every aspect of this  
5 except handing the pill. With, again, the exception of  
6 Pellman, who is doing both sides of it.

7 Your Honor, the NFL, they would have you believe that the  
8 NFL is some good samaritan that's kind of watching the Clubs do  
9 all these horrible things. That's exactly the opposite of  
10 what's happening.

11 Since 1968 the NFL has been actively involved in the  
12 provision of all of these prescription drugs, whether they are  
13 controlled substances or whether they are just prescription  
14 drugs. And the Third Amended Complaint is replete with  
15 evidence of NFL employees and action taking place.

16 **THE COURT:** Give me what you would say is your best  
17 example of an NFL employee violating the Controlled Substances  
18 Act.

19 **MR. CLOSIUS:** When they are telling people to  
20 distribute it illegally.

21 Your Honor, the --

22 **THE COURT:** Where is that --

23 **MR. CLOSIUS:** Let me rephrase that.

24 The Third Amended Complaint is replete with people telling  
25 the NFL that what's happening is illegal. The DEA is doing it.



1 The Matava report is doing it. They are being told all through  
2 about illegal dispensation of controlled substances.

3 **THE COURT:** By who? By the Clubs?

4 **MR. CLOSIUS:** By the Clubs.

5 **THE COURT:** Okay. That's not the same though. Let's  
6 say that the -- let's say the -- somebody is telling the NFL,  
7 Hey, the Clubs are violating the Controlled Substances Act.  
8 That's not the same as the NFL itself violating anything.

9 **MR. CLOSIUS:** Well, they never did anything to remedy  
10 it.

11 **THE COURT:** Well, that's the original theory.

12 **MR. CLOSIUS:** I'm sorry. They are also telling the  
13 NFL -- the NFL is meeting with the DEA. As I noted in  
14 Paragraph 11, their own people are saying that we have -- we  
15 have joint culpability on this.

16 **THE COURT:** No. That's not quite there. It was an  
17 associate of somebody who was an advisor to the NFL who said  
18 there was joint culpability.

19 **MR. CLOSIUS:** Why would he say that?

20 **THE COURT:** "Culpability" was not referring  
21 necessarily to the Controlled Substances Act. It was referring  
22 to a moral thing, the way I read it.

23 But whatever. It wasn't the NFL itself admitting that it  
24 had violated any Controlled Substances Act.

25 **MR. CLOSIUS:** Their knowledge of the --

1           **THE COURT:** What is it that -- the worse that I think  
2 you could say, I don't even know if you could say this, is that  
3 the NFL -- somebody has told the NFL or the NFL itself may  
4 think that the Clubs are violating the Controlled Substances  
5 Act. But is that the same thing as the NFL violating the Act?

6           **MR. CLOSIUS:** When the NFL is involved to the extent  
7 they are involved in, we believe it is. When they are  
8 mandating, when they are squashing surveys that are trying to  
9 be done to show the extent of the problem, when they are paying  
10 for these reports, they are telling them it's being done  
11 illegally and nobody does anything. I mean, they are  
12 encouraging this conduct, if not mandating it.

13           That's why on all the bullet points you notice we do say  
14 directly or indirectly.

15           **THE COURT:** I'm going to give you two minutes on the  
16 other side and I'm going to bring it to an end. I've got an  
17 11:00 o'clock calendar.

18           **MR. NASH:** Your Honor, all I would say is that the  
19 arguments you all just heard were nothing more than the claim  
20 of either -- that the NFL had some knowledge and didn't act or  
21 didn't intervene. And that's the claim that you held was  
22 preempted. That's the claim that they disavowed on appeal.  
23 They said no, no, no. That was not our claim.

24           We're talking about direct violations of the law by the  
25 NFL. We pointed out in our -- we explained in our motion they

1 don't -- the Third Amended Complaint doesn't allege any such  
2 violations. I made that argument here today.

3 Counsel has still never identified anything that would be  
4 remotely considered on any basis to say that the NFL has  
5 violated any of these statutes. On that basis alone the  
6 Complaint should be dismissed.

7 But on top of that, even if you credited everything that  
8 he was saying, he keeps ignoring and they keep ignoring what  
9 their own clients are saying caused their injuries. What their  
10 own clients are saying is my doctor, I got some drugs. I -- I  
11 didn't get the right evaluation by the doctor. I -- I didn't  
12 get the right warnings and I -- I was damaged as a result.

13 The Ninth Circuit said, you can't rely on that to state a  
14 claim against the NFL. You have to show or you have to at  
15 least plead that the NFL itself violated these statutes.

16 And by the way, I don't believe if I were here on behalf  
17 of the Clubs, I would have -- I would be arguing that the  
18 Complaint does not allege that any Club or any Club  
19 doctor violated any of these statutes.

20 But putting that aside, they have not come close to  
21 meeting the Ninth Circuit's standard on remand.

22 **THE COURT:** I want to ask you if you will submit to  
23 me, if you will, by 5:00 o'clock tomorrow an agreed-upon  
24 transcript of the oral argument before the Ninth Circuit and  
25 then the -- the plaintiff gets to highlight in pink whatever

1 you want me to particularly focus on and the defendant gets to  
2 highlight in -- do it, let's say, orange or some color that I  
3 can read through. One time I asked the lawyers to do this and  
4 they highlighted in a color it was so hard to read through. It  
5 was impossible. It was like redacting. So it has to be  
6 legible enough that I can read it. So you pick a color that I  
7 can -- one color. I don't care what the colors are. I need to  
8 be able to read through it. And you should give it to me by  
9 5:00 o'clock tomorrow so I can see what was represented to the  
10 Ninth Circuit.

11 All right. We've gone almost not quite two hours. Maybe  
12 we have gone two hours. I need to bring it to a close. Very  
13 interesting. Thank you, counsel.

14 **MR. NASH:** Thank you, Your Honor.

15 **MR. CLOSIUS:** Thank you, Your Honor.

16 (Proceedings adjourned.)  
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CERTIFICATE OF OFFICIAL REPORTER

I certify that the foregoing is a correct transcript from  
the record of proceedings in the above-entitled matter.

*Debra L. Pas*

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Debra L. Pas, CSR 11916, CRR, RMR, RPR

Thursday, April 11, 2019